Supreme Court U.S.
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No. 02 380

In The

Supreme Court of the United States

IBRAHN BEN MIRANDA,

Petitioner,

v.

ROY A. CASTRO, WARDEN;
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether equitable tolling is warranted where petitioner's appointed appellate counsel prevented petitioner from filing his federal petition for writ of habeas corpus within the time constraints imposed by Title 28 U.S.C. section 2244, subdivision (d), subsection (1)(A) by providing petitioner with legally erroneous information with respect to the statute of limitations which petitioner relied on in filing his federal petition that the District Court ruled was untimely.

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PETITION FOR CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner/Appellant, Ibrahn Miranda, hereby petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision affirming the decision of the United States District Court, Central District of California, denying and dismissing his Petition for Writ of Habeas Corpus as untimely within the meaning of Title 28 U.S.C. section 2244, subdivision (b), subsection (1)(A).

OPINION BELOW

On May 17, 2001, the United States District Court for the Central District of California adopted the Report and Recommendation of the Magistrate Judge and denied petitioner's Petition for Writ of Habeas Corpus and dismissed it as untimely. [Appendix B.] On October 25, 2001, the United States Court of Appeals for the Ninth Circuit granted petitioner's request for a certificate of appealability. On June 2, 2002, the Ninth Circuit Court of Appeals, in a published decision, affirmed the decision of the United States District Court and determined that the court properly dismissed the Petition as untimely. [Appendix A.] On June 19, 2002, petitioner filed a Petition for Rehearing arguing that a rehearing should be granted because the Ninth Circuit Court of Appeals overlooked material points of fact and law in the published decision, namely the State of California's interpretation of what constitutes direct review and the duration of appointed appellate counsel's representation. On July 31, 2002, the Ninth Circuit Court

of Appeals denied petitioner's Petition for Rehearing. [Appendix C.]

JURISDICTION

The United States District Court for the Central District of California denied Petitioner's Petition for Writ of Habeas Corpus on May 17, 2001. [Appendix B.] Pursuant to Title 28 U.S.C. section 2253, subdivision (c), subsection (1), petitioner requested a certificate of appealability in the District Court. Following the District Court's denial of petitioner's Request for a Certificate of Appealability, petitioner requested a Certificate of Appealability from the United States Court of Appeals for the Ninth Circuit pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure and Local Rule 22-1, subdivision (c) as well as Title 28 U.S.C. section 2253, subdivision (c), subsection (1). The Ninth Circuit Court of Appeals granted petitioner's request on October 25, 2001.

The jurisdiction of this Court is invoked under Title 28 U.S.C. section 1254, subdivision (1). *Hohn v. United States,* 524 U.S. 236 [118 S.Ct. 1969, 141 L.Ed.2d 242] (1998).

CONSTITUTIONAL PROVISIONS AND STATUTES

A. The Sixth Amendment of the United States Constitution

> In all criminal prosecutions, the accused shall . . . have the assistance of Counsel for his defence.

B. Title 28 U.S.C. section 2244, subdivision (d), subsection (1)(A)

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run for the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the period to seek review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or law of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT OF THE CASE

An information filed on January 22, 1997, alleged in Count I that on or about August 24, 1996, petitioner murdered Rene Soto in violation of Penal Code section 187, subdivision (a). Count II alleged that on or about the same date, petitioner murdered Jose Romero in violation of Penal Code section 187, subdivision (a). Count III alleged that on or about the same date, petitioner

attempted to murder Chirag Govani in violation of Penal Code sections 664/187, subdivision (a). With respect to Counts I and II, it was alleged that petitioner intentionally inflicted great bodily injury and death on Soto and Romero by discharging a firearm from a motor vehicle within the meaning of Penal Code section 12022.55.[1] It was also alleged with respect to Count II that the offense was committed with special circumstances within the meaning of Penal Code section 190.2, subdivision (a), subsection (3) in that petitioner committed more than one offense of murder in either the first or second degree.[2] (C.T. 243-245.) It was further alleged with respect to all counts that petitioner personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a), subsection (1).

On December 23, 1997, a jury found petitioner guilty of first degree murder in Counts I and II and of attempted murder in Count III. The jury also found that petitioner personally used a firearm in the commission of each of the offenses. (R.T. 1027-1029; C.T. 351-353.) Petitioner was thereafter sentenced on Count I to 25 years to life, a consecutive term of 25 years to life on Count II, and a consecutive high term of nine years on Count III. The court further imposed consecutive sentences of ten years for each separate personal use allegations. (R.T. 1045-1047; C.T. 366-369.)

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[1] On the court's own motion, the Penal Code section 12022.55 allegations were dismissed since the court found that 12022.55 allegations do not apply to vehicle to vehicle shooting. (R.T. 547-550; C.T. 277.)

[2] Prior to trial, the special circumstances allegation was dismissed by the court on the People's motion. (R.T. A-1 to A-2; C.T. 251.)

Petitioner filed a timely notice of appeal. Petitioner raised the following arguments on appeal: (1) Petitioner was denied his Fifth Amendment and Fourteenth Amendment due process rights and Sixth Amendment right to a fair trial when the court permitted the prosecution to use undated gang memorabilia taken from petitioner's residence and allowed the prosecution to introduce the testimony of alleged gang expert who testified regarding the meaning of the gang memorabilia and the violent nature of the gang culture, (2) The court deprived petitioner of his Sixth and Fourteenth Amendment rights to a fair trial by an impartial jury when the court, in response to a jury question, instructed the jury that petitioner's case was not a death penalty case, (3) The trial court erred when it refused to grant petitioner post-trial access to sealed jury information including addresses and phone numbers, (4) The evidence was insufficient as a matter of law to support petitioner's convictions of first degree murder. On April 23, 1999, in an unpublished opinion, the Court of Appeal of the State of California, Second Appellate District, Division One affirmed petitioner's conviction and sentence. Petitioner filed a timely Petition for Review in the California Supreme Court. On July 15, 1999, the California Supreme Court denied the Petition on the merits.[3] On July 28, 1999, petitioner's appointed appellate counsel sent him a letter indicating that his Petition for Review was denied by the California Supreme Court and informing him that he had until April 23, 2001 to file a Petition for Writ of Habeas Corpus in federal court.

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[3] Justice Mosk, however, was of the opinion that the Petition for Review should be granted.

On December 5, 2000, petitioner filed a Petition for Writ of Habeas Corpus and supporting Memorandum of Points and Authorities in the United States District Court, Central District of California. On February 20, 2001, respondent filed an answer wherein it alleged that the Petition was untimely and alleged that each of the claims failed on the merits. On April 6, 2001, petitioner filed a Traverse to respondent's Answer. On May 17, 2001, the Honorable Nora M. Manella adopted the Report and Recommendation of the Magistrate Judge and signed an Order dismissing the Petition as untimely. [Appendix B.] On June 13, 2001, petitioner filed a notice of appeal and requested a certificate of appealability. On June 25, 2001, the Honorable Nora M. Manella denied petitioner's request for a certificate of appealability. The Ninth Circuit Court of Appeal granted petitioner's request on October 25, 2001. On June 12, 2002, the Ninth Circuit Court of Appeals affirmed the decision of the United States District Court. [Appendix A.] Petitioner's Petition for Rehearing was denied on July 31, 2002. [Appendix C.]

STATEMENT OF FACTS

Prosecution's Case

The Shooting:

On the evening of August 24, 1996, Chirag Govani, aka "Spooky" and "Big Boy", Jose Romero, aka "Turtle," and others were at the home of Richard Landa after attending a church ceremony in honor of Landa's deceased brother. Shortly after arriving at Landa's home, Govani and Romero left in order to find a telephone and "drive around." Govani, Romero and Landa were all members of

a gang known as the Hobart Tiny Ones or "HTO." (R.T. 63-66, 139-142, 215, 226.)

Driving down Lindley Avenue, Govani, who was in his late 20's, saw a fifteen year old boy he recognized as "Alfie," Brian Lester, standing in front of an apartment building. (R.T. 66-67, 143.) Jess Orozco, a fifteen year old friend of Lester's was also there. Lester and Orozco were waiting outside the apartment building for petitioner to pick them up. (R.T. 219-220, 225-226, 266.)

Govani knew Lester to be a member of the Harpys gang and had heard that there may have been a fight at a party several months earlier between Harpys and HTO gang members. (R.T. 67, 144.) After stopping the car in the middle of the street, Govani and Romero got out and Govani asked Lester if there was a problem between the two gangs. Lester replied that he had not heard of any trouble but that the person that was coming to pick him up would know. (R.T. 68, 147-149.) Romero then asked Lester where he was from, meaning what was his gang affiliation, and Lester said Harpys. Romero stated his own gang affiliation, then asked Lester where his homeboy with the white Toyota and rims was. Lester replied that he was on the way there.

Govani told Lester that if it turned out that there was a problem between HTO and Harpys, they were going to "throw down," meaning have a fist fight, "to resolve it." Govani said that they would be back in 10-15 minutes, and Lester said that he would be there. (R.T. 71, 150, 230-231, 233, 264-266.) Govani drove back to Landa's and picked up Rene Soto, aka "Cabron," to help with the fight. (R.T. 72-73, 152.)

Some time between 7:45 and 8:45 p.m., Govani and the others returned and pulled into the Granada Hills High School parking lot across the street from the apartment building. One of Lester's friends went over to the car and said something to Govani, possibly to the effect of "let's keep it cool." (R.T. 76, 187, 206, 270, 272.) Just then, petitioner, aka "Evil," a Harpys member, pulled up in front of the apartment building in a blue Toyota Camry with tinted back windows.[4] When Lester told petitioner about the two guys who wanted to "throw down," petitioner told them to get in the car so that they could get out of there. Lester and Orozco got in and petitioner drove away. (R.T. 77, 80-81, 218, 220-221, 236-237, 272, 274.)

Govani had been expecting petitioner and the others to come over to the parking lot and meet with him to fight in response to his challenge. Both Govani and Orozco understood that the failure to respond to the challenge would mean that petitioner and the others were "punks" and afraid to fight. (R.T. 95-97, 232.) When petitioner drove away instead of confronting Govani, Govani turned his car on and drove after petitioner. (R.T. 97-98.) Although it was getting dark, Govani's headlights were off. (R.T. 206, 289, 304.) About halfway to Hiawatha Street, Govani caught up with petitioner's car and, crossing over the lane of oncoming traffic, pulled alongside it. The passengers in one or both cars "threw gang signs" at each other. One of the passengers in Govani's car yelled, "pull over." Petitioner responded, "Fuck this shit . . . I'm not pulling

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[4] Petitioner sometimes drove his white Toyota Camry and sometimes drove his brother's which is blue. (R.T. 224.)

over" and continued to drive. (R.T. 80-81, 97-98, 206, 237-239, 275.)

Govani passed petitioner's car and pulled in front. (R.T. 99-100, 239.) Orozco, fearing that something was going to happen, slouched down in the back seat. (R.T. 278, 305.) As Govani approached a stop sign at the intersection of Lindley and Hiawatha, he noticed petitioner reaching over and slightly downwards with his right hand. Based on his past gang experience, Govani was concerned that petitioner might be reaching for a gun. Govani rolled through the stop sign, stopped briefly in the intersection, then made a left turn onto Hiawatha Street. In the meantime, petitioner had stopped his car in the intersection and had pulled out a gun with his right hand. Putting a bullet in the chamber with his left hand, he then fired approximately 13 rounds at Govani's vehicle. (R.T. 100-104, 172, 190, 239-244.) Govani heard the shots and the sound of his rear window shattering and saw that Romero had been shot in the head. Govani ducked down, taking his foot off of the gas, and was hit on his right rear shoulder with a metal bullet fragment. Soto, who was sitting in the rear, was shot in the back. The car itself was hit with numerous additional bullets and was "jumping." (R.T. 104-108, 171, 244-245.)

When the shooting stopped, Romero's head had fallen on Govani's shoulder. Govani continued driving down Hiawatha Street and returned to the Landa's house. Romero was bleeding heavily and did not respond when petitioner talked to him. Soto was still conscious. When Govani reached Landa's his friends there told him to drive to the hospital and said they would follow him in case he needed any help. (R.T. 108-112, 207-208.)

On the way to the hospital, Govani's car got a flat tire. He pulled into a Subway parking lot, went inside and asked for help. He then went into the bathroom to see where the bullet fragment had hit him. Meanwhile, his friends had pulled into the parking lot and were trying to move Romero and Soto into their car.

The Aftermath at Petitioner's House:

After the shooting, petitioner dropped the gun on the floor of the car and continued driving down Lindley towards Devonshire. He turned right on Devonshire, passing the police station and drove on residential streets back to his house, while listening to his police scanner. As petitioner, Lester and Orozco walked into petitioner's house, they heard on the scanner that there had been a gang confrontation involving the Harpys. According to Orozco, this news seemed to make petitioner happy. Based on his own experience, Orozco testified that violent acts enhance the reputation of the gang by making it appear more ruthless and that a gang member who commits violent acts is seen as more of a "heavy hitter" in the gang.

REASON FOR GRANTING REVIEW

IN ORDER TO DETERMINE WHETHER APPOINTED APPELLATE COUNSEL'S LEGALLY ERRONEOUS ADVICE MISINFORMING PETITIONER OF HIS FEDERAL HABEAS DUE DATE CONSTITUTES AN EXTRAORDINARY CIRCUMSTANCE JUSTIFYING EQUITABLE TOLLING

A judgement becomes final within the meaning of Title 28 U.S.C. section 2244, subdivision (d), subsection

(1)(A) on the date a petition for writ of certiorari is denied by the United States Supreme Court and, if certiorari is not sought, then the judgment becomes final, and direct review is concluded, when the 90 day period for filing a certiorari petition expires. In the instant case, petitioner's Petition for Review was denied by the California Supreme Court on July 15, 1999. Petitioner's conviction became final by the conclusion of direct review on October 19, 1999, the last date petitioner had to file a petition for writ of certiorari. Absent tolling, petitioner's federal habeas petition should have been filed on October 19, 2000. However, extraordinary circumstances compel the equitable tolling of AEDPA's statute of limitations in the instant case. Therefore, petitioner's Petition for Writ of Habeas Corpus filed in the United States District Court on December 5, 2000 should be deemed timely. The District Court's decision to the contrary which was affirmed by the Ninth Circuit Court of Appeals is erroneous.

In *Calderon v. U.S. Dist. Court for the Central Dist. of Cal. (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 1997), the Ninth Circuit Court of Appeals, relying on *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95-96 [111 S.Ct. 453, 112 L.Ed.2d 435] (1990), found that the AEDPA's statute of limitations is subject to equitable tolling in extraordinary circumstances. In 1998, the Ninth Circuit clarified its earlier holding in *Beeler* and stated that the "time bar of 28 U.S.C. section 2244, subdivision (d), subsection (1) can be tolled if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Calderon v. U.S. Dist. Court for Central Dist. of Cal. (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998). In the instant case, appointed appellant counsel's professional incompetence prevented petitioner from filing his federal petition

on time. Due to this deprivation of his Sixth Amendment right to the effective assistance of appellate counsel, the statute of limitations must be tolled in order to avoid "inequitable circumstances," namely a forfeiture of petitioner's right to have the federal court review the state court's violations of his federal constitutional rights. *Valverde v. Stinson*, 224 F.3d 129, 133 (2nd Cir. 2000).

On July 28, 2000, following the denial of his Petition for Review in the California Supreme Court, appointed appellate counsel sent petitioner a letter informing him that her appointment had ended and instructing him to file any federal habeas petition by April 23, 2001 in order to comply with the statute of limitations. [Appendix D.] Believing that his appellate counsel understood the law, petitioner relied on this representation. [Appendix E: Declaration of Petitioner.] Since petitioner is not versed in the law and is serving a lengthy sentence, his family planned to hire habeas counsel to represent him in the federal court in plenty of time to comply with the deadline as represented to him by appellate counsel. [Appendix E.] In November, 2000, when petitioner's family had gathered enough money to hire habeas counsel, they contacted Marilee Marshall in order to retain her to represent petitioner in the District Court. The family told Ms. Marshall that appellate counsel stated petitioner's federal petition was due on April 23, 2001. [Appendix F: Declaration of Marilee Marshall.] In November 2000, petitioner's family met with and retained Ms. Marshall and brought all legal documents in their possession. At that time, Ms. Marshall noticed that the information provided by appellate counsel was incorrect and that petitioner's federal writ was actually due on October 19, 2000. [Appendix F.] Ms. Marshall began working on the federal petition

immediately and submitted it to the District Court on December 5, 2000. [Appendix F.]

Petitioner requested the District Court equitably toll the statute of limitations based on the deprivation of his Sixth Amendment right to the effective assistance of counsel because had petitioner not relied on the representations of appellate counsel, he would have retained habeas counsel in time to comply with the October 19, 2000 deadline. The District Court, however, refused to equitably toll the statute of limitations and dismissed petitioner's Petition for Writ of Habeas Corpus as untimely. [Appendix B] The District Court's finding that equitable tolling was unwarranted was incorrect.

In reaching the conclusion that petitioner was not entitled to equitable tolling despite the fact that his appointed appellate counsel provided him with incorrect information regarding the date when his federal petition was due and petitioner relied on that information, the District Court relied on the holdings in *Bunney v. Mitchell*, 241 F.3d 1151, 1157 (9th Cir. 2001), *Kruetzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000), *Harris v. Hutchinson*, 209 F.3d 325, 330-331 (4th Cir. 2000), *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) and *Sandvik v. United States*, 177 F.3d 1369, 1272 (11th Cir. 1999). [Appendix B.] The Court of Appeals for the Ninth Circuit in affirming the District Court's ruling relies on *Frye v. Hickman*, 273 F.3d 1144 (9th Cir. 2001) and numerous cases from outlying Courts of Appeal, including *Smaldone v. Senkowski*, ___ F.3d ___ [2001 WL 1453925] (2nd Cir. 2001), *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001), *Kruetzer v. Bowersox*, *supra*, 231 F.3d 450, *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000), *Geraci v. Senkowski*, 211 F.3d 6, 9 (2nd Cir. 2000), *Harris v. Hutchinson*, 209 F.3d 325, 330-331

(4th Cir. 2000), *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999), *Sandvik v. United States*, 177 F.3d 1269, 1272 (11th Cir. 1999), *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000), and *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999). These cases, however, are inapplicable to the instant case. The cases cited above and relied on by the District Court and the Ninth Circuit Court of Appeals address the situation where **post conviction** habeas counsel either fails to timely file a federal petition for writ of habeas corpus within the time constraints of AEDPA or provides erroneous information regarding the deadline to file such a petition. However, the situation presented in the instant case is materially distinguishable since, in the instant case, petitioner's failure to comply with the time constraint set forth in AEDPA was the direct result of a deprivation of his Sixth Amendment right to the effective assistance of appellate counsel.

In the instant case, it was appointed appellate counsel who provided petitioner with erroneous legal advice. Unlike post conviction habeas counsel, a criminal defendant has a Sixth Amendment right to the effective assistance of appellate counsel. The Sixth Amendment to the United States Constitution has been interpreted by the United States Supreme Court to guarantee to every criminal defendant the right to effective assistance of counsel. *Gideon v. Wainright*, 372 U.S. 335, 344 [83 S.Ct. 792, 796, 9 L.Ed.2d 799] (1963). Therefore, "[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel." *U.S. v. Cronic*, 466 U.S. 648, 654 [104 S.Ct. 2039, 80 L.Ed.2d 657] (1984), quoting from *McMann v. Richardson,* 397 U.S. 759, 771, n. 14 [90 S.Ct. 1441, 1449, 25 L.Ed.2d 763] (1970). The right to effective assistance of counsel includes the right to the

effective assistance of appellate counsel. *Jones v. Barnes*, 463 U.S. 745, 754 [103 S.Ct. 3308, 77 L.Ed.2d 987] (1983); *Douglas v. California*, 372 U.S. 353 [83 S.Ct. 814, 9 L.Ed.2d 811] (1963); *Evitts v. Lucey*, 469 U.S. 387, 397 [105 S.Ct. 830, 83 L.Ed.2d 821] (1985).

Effective appellate counsel would certainly provide accurate information regarding the deadline for a pro per defendant to file a petition for writ of habeas corpus in the federal court. Furthermore, a pro per defendant with no training in law should be able to rely on appellate counsel's representations regarding the time constraints imposed by AEDPA and should not be required to second guess statements made by appellate counsel who have a constitutional duty to provide effective assistance. Therefore, unlike the defendant/petitioners in the cases relied on by the District Court in its Report and Recommendation, petitioner had a constitutional right to the effective assistance of counsel and, thus, was denied his Sixth Amendment right when counsel provided him with incorrect information regarding the time constraints imposed on a federal habeas petition. Petitioner submits that the deprivation of his Sixth Amendment right to the effective assistance of appellate counsel is an extraordinary circumstance beyond his control which made it impossible for him to file the instant petition on time. Therefore, contrary to the finding of the District Court, equitable tolling should apply.

An indigent defendant in California or any state in which a direct appeal is a statutory right has a federal constitutional right to the appointment of competent counsel on direct appeal. *Evitts v. Lucey, supra,* 469 U.S. 387. A non-capital indigent defendant apparently has, however, no constitutional right to competent counsel, in

pursuing any form of collateral review, despite the fact that he or she has rights under the United States Constitution to pursue such review. The Ninth Circuit Court of Appeals in affirming the District Court's decision, now apparently holds that in the absence of a constitutional right to counsel on collateral review, counsel appointed for direct appeal, is under no obligation at the conclusion of the direct appeal, to advise his or her client about avenues of collateral relief that may be available to him or her under the Constitution of the United States. Conversely, since the indigent client has no right to such advice, he/she necessarily has no constitutionally protected interest in ***competent*** gratuitous information volunteered by appointed appellate counsel. If indeed, as is the case with petitioner, the indigent defendant relies on the gratuitous advice of his previous court appointed counsel that turns out to be erroneous, he is without recourse no matter how disastrous the consequences.

The Ninth Circuit in its published opinion does not, however, state whether or not its holding turns on the fact that it believes that at the time court appointed counsel rendered the advice in question, her appointment to represent petitioner was complete. In California, direct review includes not only a petition for discretionary review to the California Supreme Court, ***but also*** a Petition for Certiorari to the United States Supreme Court. Direct review and an appointed attorney's representation do not conclude until the filing of a petition for certiorari in this Court, or until the time for filing such a petition expires. *Calderon v. United States District Court, supra*, 128 F.3d 1283, n.2 (9th Cir. 1997), *Bowen v. Roe,* 188 F.3d 1157 (9th Cir. 1999), *Teague v. Lane*, 489 U.S. 288, 295 [109 S.Ct. 1060, 103 L.Ed.2d 334] (1989), *Caspari v. Bohlen*, 510 U.S.

383, 390 [114 S.Ct. 948, 127 L.Ed.2d 236] (1994). During this period, an attorney appointed for direct appeal continues to represent his or her client. While it is true that Petitions for Certiorari are not appropriate and thus not filed in most cases, the decision whether to file one can be made at anytime prior to the expiration of the ninety day window period. Even when an appointed attorney may not contemplate filing a petition for certiorari at the time that the California Supreme Court denies review, intervening case law may render the filing of such a petition appropriate, and if so the filing of such a petition would be within the scope of counsel's appointment. Petitioner's petition for discretionary review to the California Supreme Court was denied on July 15, 1999. On July 28, 1999, when counsel wrote the letter with the faulty advice, she still had until October 13, 1999 to file a Petition for Certiorari and her representation necessarily continued until that time expired.

Petitioner submits that since the letter from his counsel with the faulty advice was rendered during the time when his case was still on direct review, he was entitled to rely on his appointed attorney's advice at least, as here, with respect to what he would have perceived to be her area of knowledge. Unfortunately, very few lay people, let alone indigent defendants understand the distinction between direct and collateral review. Petitioner simply understood he had a criminal case he wanted to "appeal" and that the court had appointed him an attorney. Petitioner's court appointed counsel rendered advice ***during the course of her representation***, which petitioner would have been perceived to be within the scope of her representation, advice he had every reason to expect

would be competent as the court had, after all appointed her to represent him in appealing his criminal conviction.

Petitioner further submits that the reasoning underlying this Court's decision in *Edwards v. Carpenter*, 529 U.S. 446 [120 S.Ct. 1587, 146 L.Ed.2d 518] (2000) should apply to cases such as this where the statute of limitations was missed as a result of a deprivation of the Sixth Amendment right to the effective assistance of appellate counsel and a petitioner seeks to have the statute equitably tolled. The Court in *Edwards* recognized that in certain circumstances, counsel's ineffectiveness in failing to properly preserve a claim for federal review in state court will suffice to establish cause for procedural default. The rationale underlying this Court's decision in *Edwards* is that a habeas petitioner should not be punished for counsel's negligence if that person can show that counsel was ineffective and that he suffered prejudice therefrom. Petitioner submits that the same rationale applied in *Edwards* should apply to the instant case. The fact that petitioner was denied his Sixth Amendment right to the effective assistance of appellate counsel should be considered in determining whether to equitably toll the statute of limitations because it was counsel's incompetence which resulted in the late filing and which may ultimately result in petitioner's case never being heard by the federal courts despite violations of his federal constitutional rights. Furthermore, since one of petitioner's claims raise an allegation of actual innocence of one of the crimes for which he was convicted, a fundamental miscarriage of justice will result absent federal habeas review since the state court has already heard and rejected an identical claim. Petitioner can conceive of no reason ineffective assistance of counsel claims should "save" claims which

are procedurally defaulted, but should not "save" claims which are time barred as a result of ineffective assistance.

Furthermore, the District Court concluded that even if a pro per defendant "ought to be entitled to rely on appellate counsel's representations regarding AEDPA," such reliance will not help petitioner obtain equitable tolling in the instant case. [Appendix B.] In support of this conclusion, the District Court found, that although appellate counsel mistakenly told petitioner that he needed to file his federal petition by April 23, 2001, "[p]etitioner's attorney properly and repeatedly advised him that he had one year to file his federal petition. His attorney specifically told him that he must file his petition "**no later than one year after the conclusion of the state court's direct review of your claims**." [Appendix B.] This conclusion, however, presupposes that a pro per defendant with little or no formal education and certainly no training in the law, would understand what "direct review" consists of and thus, should have disregarded the specific filing date provided to him by appointed appellate counsel. This conclusion is unreasonable. The more-reasonable interpretation is that a pro per defendant with no knowledge of complex federal habeas corpus procedural requirements would assume that appellate counsel knew when direct review concluded and thus, provided an accurate date for filing. A pro per defendant should not be required to disregard the specific, comprehensible advice provided to him by appointed appellate counsel.

Furthermore, the District Court faults petitioner for failing to file a petition for writ of habeas corpus in pro per in a timely manner. However, the District Court forgets that petitioner, relying on the advice of his appointed appellate attorney, believed that his petition would be

prepared and filed in a timely manner. Petitioner believed that his federal petition for writ of habeas corpus was due by April 23, 2001 and had every intention of complying with that deadline. Thus, petitioner should not be faulted for waiting to proceed in federal court until late November when his family raised enough money to employ counsel to assist him with his federal writ. When petitioner consulted habeas counsel, he still believed he was in compliance with AEDPA's time requirements. [Appendix E and Appendix F.] Petitioner's failure to comply with AEDPA's one year statute of limitations is the direct result of a deprivation of his Sixth Amendment right to the effective assistance of appellate counsel. Petitioner should not be punished for listening to the advice of his appellate attorney and planning according to that advice.

In the instant case, appellate counsel's incompetent advice regarding the deadline for filing a Petition for Writ of Habeas Corpus in federal court is an "extraordinary circumstance" which directly resulted in petitioner's untimely filing and thus, equitable tolling is warranted. Unless petitioner is granted relief from AEDPA's statute of limitations, he will be prohibited from having the federal courts review of the federal constitutional violations which occurred during the state court proceedings. This is a harsh price to pay for a default based solely on a deprivation of petitioner's Sixth Amendment right to the effective assistance of counsel.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this Court grant certiorari and reverse the United States Court of Appeal for the Ninth Circuit and grant petitioner's petition for writ of habeas corpus.

Dated: September 6, 2002

Respectfully submitted,

MARILEE MARSHALL
Attorney for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IBRAHN BEN MIRANDA,

Petitioner-Appellant,

v.

RAY CASTRO, WARDEN; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondents-Appellees.

No. 01-56124

D.C. No. CV-00-12721-NM

OPINION

Appeal from the United States District Court for the Central District of California
Nora M. Manella, District Judge, Presiding

Submitted June 3, 2002*
Pasadena, California

Filed June 12, 2002

Before: Diarmuid F. O'Scannlain, Pamela Ann Rymer, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge O'Scannlain

COUNSEL

Marilee Marshall, Marilee Marshall & Associates, Pasadena, California, for the petitioner-appellant.

Bill Lockyer, Attorney General of California; Robert R. Anderson, Chief Assistant Attorney General; Pamela

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* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

C. Hamanaka, Assistant Attorney General; and Deborah J. Chuang and G. Tracey Letteau, Deputy Attorneys General, Los Angeles, California, for the respondents-appellees.

OPINION

O'SCANNLAIN, Circuit Judge.

We are asked to decide whether a habeas petitioner's reliance on the erroneous advice of appointed counsel is sufficient to warrant equitable tolling of the one-year statute of limitations on filing a federal habeas corpus petition.

I

Following a jury trial in Los Angeles Superior Court, petitioner Ibrahn Ben Miranda was convicted on two counts of first degree murder and one count of attempted murder. The jury also found, as to all counts, that Miranda personally used a handgun in the commission of the crimes. He was sentenced to eighty-nine years to life in state prison.

Miranda appealed his conviction to the California Court of Appeal. In an unpublished opinion dated April 23, 1999, that court affirmed the judgment of the trial court. Miranda also filed a petition for review in the California Supreme Court, which that court summarily denied on July 15, 1999.

Miranda next filed the federal petition that gives rise to this appeal in the U.S. District Court for the Central District of California, on December 5, 2000. The Warden

argued that the petition was untimely filed, and moved to dismiss it. Magistrate Judge Andrew Wistrich filed a Report and Recommendation in which he recommended that the petition be dismissed as untimely. The district court agreed; it adopted the Report and Recommendation in full. Judgment was entered accordingly, and Miranda timely filed a Notice of Appeal ("NOA").

On the same day he filed his NOA, Miranda also filed a request with the district court for a Certificate of Appealability ("COA") on the issue of whether he was entitled to equitable tolling. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1) ("In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, . . . the applicant *cannot* take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).") (emphasis added). The district court denied that request. Miranda then asked this court for a COA on the issue of equitable tolling. *See* Fed. R. App. P. 22(b)(1); 9th Cir. R. 22-1(c). A motions panel granted the request, and issued a COA on the issue of "whether the district court erred by dismissing the petition as untimely."

II

We begin with the relevant timeliness calculations. Effective April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA"). AEDPA, of course, imposed a one-year statute of limitations for state prisoners filing federal petitions for habeas corpus. *See* 28 U.S.C. § 2244(d)(1). Thus, under AEDPA,

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

Id. § 2244(d)(1)(A).[1]

The California Supreme Court denied Miranda's petition for review on July 15, 1999. His conviction became final ninety days thereafter – on October 13, 1999 – when the time for him to file a petition for certiorari with the United States Supreme Court expired. *See Bowen v. Roe,* 188 F.3d 1157, 1158-59 (9th Cir.1999).[2] Accordingly, under AEDPA, Miranda had until October 13, 2000 to file his federal habeas petition. *See Patterson v. Stewart,* 251 F.3d 1243, 1245-46 (9th Cir.2001) (explaining that time limits under AEDPA are calculated in accordance with the provisions of Fed. R. Civ. P. 6(a)). Because he did not file his petition until December 5, 2000, the petition was fifty-three days late. Absent some kind of tolling, then, the petition was, as the district court concluded, untimely filed.[3]

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[1] Although § 2244(d)(1) sets forth three alternative possible starting dates for the commencement of the running of the statute of limitations, Miranda does not argue that any of these apply in this case.

[2] As the Warden correctly points out, Miranda incorrectly calculates the date his conviction became final as October 19, 1999. October 13, 1999 is, in fact, the correct date.

[3] Because he did not seek state post-conviction relief, Miranda does not contend that he is entitled to any statutory tolling. *See* 28 U.S.C. § 2244(d)(2).

III

Miranda contends that even though his petition was filed after the 1-year statute of limitations had passed, the district court nonetheless should have applied equitable tolling to find the filing was timely. Miranda bears the burden of showing that this extraordinary exclusion should apply to him. *See United States v. Marolf,* 173 F.3d 1213, 1218 n. 3 (9th Cir. 1999).

Miranda's argument centers around a letter he received from his appointed appellate counsel. On July 28, 1999, Miranda's appointed appellate attorney sent him a letter indicating that his petition for review had been denied by the California Supreme Court. The letter read as follows:

> Dear Mr. Miranda:
>
> I regret to inform you that the California Supreme Court has denied the petition for review of your case. A copy of the Court's order is enclosed for your information.
>
> At this point my appointment to represent you is concluded. If you wish to pursue the case yourself, you may do so through a federal habeas corpus proceeding with respect to the issues raised in the briefs on appeal. If you decide to file such a petition on your own or with other counsel with respect to those issues, you must do so no later than one year after the conclusion of the state court's direct review of your claims. Because it is not clear when that one-year clock starts running, the safest approach would be to file the petition as soon as possible and in any event within one year after the issuance of the Court of Appeal opinion, which in this case

> means by April 23, 2001. (Please note that if for some reason you miss that date, the court may still accept the filing; I am just giving you the most conservative deadline.)
>
> I have enclosed the form for a federal habeas corpus petition and instructions. Alternatively, if you wish to raise additional issues not raised on appeal, you would have to begin the process in the state superior court, again as soon as possible.

Significantly, this letter obviously contained either a miscalculation – or, more probably, a typo. The letter recommended that Miranda file any federal habeas petition "within one year after the issuance of the [California] Court of Appeal opinion, which in this case means by April 23, 2001." As noted above, however, the California Court of Appeal issued it on April 23, 1999; accordingly, "one year after the issuance of" the opinion would actually fall on April 23, 2000, rather than 2001. Nonetheless, Miranda filed a declaration before the district court in which he stated that he read this letter and informed his family that he had until April 23, 2001 to file a federal habeas petition. The family "agreed to save money and hire an attorney in plenty of time to do my federal petition." Miranda further averred that he relied upon the appointed attorney's advice – which turned out to be erroneous – and that "but for that reliance my petition would have been filed" in a timely manner. Therefore, Miranda contends, equitable tolling should be applied to render his late-filed petition timely.

A

We have recognized that AEDPA's statute of limitations provision is subject to equitable tolling. *See Calderon v. United States Dist. Court (Beeler),* 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part on other grounds by Calderon v. United States Dist. Court (Kelly),* 163 F.3d 530 (9th Cir. 1998) (en banc). We have made clear, however, that equitable tolling is "unavailable in most cases," *Miles v. Prunty,* 187 F.3d 1104, 1107 (9th Cir. 1999), and is appropriate only "if *extraordinary* circumstances beyond a prisoner's control make it impossible to file a petition on time." *Beeler,* 128 F.3d at 1288 (emphasis added). Indeed, "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule." *United States v. Marcello,* 212 F.3d 1005, 1010 (7th Cir.), *cert. denied,* 531 U.S. 878 (2000).

We recently addressed the question whether an attorney's negligence in calculating the due date for a federal habeas petition, and concomitant late filing of such petition, meet this high threshold of "extraordinary circumstances" sufficient to warrant equitable tolling. *See Frye v. Hickman,* 273 F.3d 1144 (9th Cir. 2001), *cert. denied,* ___ S.Ct. ___, No. 01-1306, 2002 WL 386653 (U.S. May 13, 2002). We answered the question in the negative, "conclud[ing] that the miscalculation of the limitations period by . . . counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling." *Id.* at 1146.[4] Unless Miranda

[4] In so holding, we joined a host of other circuits which have arrived at the same conclusion. *See, e.g., Smaldone v. Senkowski,* 273 F.3d 133, 138-39 (2d Cir.2001) (finding "attorney error inadequate to

(Continued on following page)

can somehow distinguish *Frye,* then, he is not entitled to equitable tolling.

B

Miranda points out that in *Frye* we were careful to distinguish our earlier decision in *Beeler.* In *Beeler,* which was a capital habeas corpus case, we held that AEDPA's one-year statute of limitations was equitably tolled when the petitioner's attorney moved out of the state – a matter over which the petitioner had no control, and which made it impossible for another attorney to file a petition within the statutory time limits. This merited equitable tolling, the *Frye* court explained, because in capital cases an indigent petitioner has a statutory right to counsel – and thus, the dereliction of the petitioner's appointed habeas counsel made it impossible for him to file. *Frye,* 273 F.3d at 1146 (citing *Beeler,* 128 F.3d at 1288); *see also Fahy,* 240 F.3d at 244 (explaining that although attorney error generally would not merit equitable tolling in a non-capital case,

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create the 'extraordinary' circumstances equitable tolling requires"); *Fahy v. Horn,* 240 F.3d 239, 244 (3d Cir.2001) ("In non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling."); *Harris v. Hutchinson,* 209 F.3d 325, 330 (4th Cir.2000) ("[W]e cannot say that the lawyer's mistake in interpreting a statutory provision constitutes that 'extraordinary circumstance' . . . that would justify equitable tolling."); *Taliani v. Chrans,* 189 F.3d 597, 598 (7th Cir.1999) (concluding that attorney's miscalculation of limitations period was not a valid basis for equitable tolling); *Kreutzer v. Bowersox,* 231 F.3d 450, 463 (8th Cir.2000) ("[C]ounsel's confusion about the applicable statute of limitations does not warrant equitable tolling."); *Steed v. Head,* 219 F.3d 1298, 1300 (11th Cir.2000) ("An attorney's miscalculation of the limitations period or mistake is not a basis for equitable tolling.").

it is more likely to do so in a capital case, because "death is different").

Miranda attempts to distinguish *Frye,* and to bring this case within the scope of *Beeler,* by emphasizing that the allegedly misleading letter set out above was prepared by Miranda's appointed counsel for direct review. Miranda's argument is that: (1) the error in calculating the statutory deadline in this case was made by Miranda's appointed appellate counsel; (2) like the petitioner in *Beeler,* Miranda had a right to that counsel – and thus, to the "effective assistance" of that counsel; and (3) therefore, like the petitioner in *Beeler,* he should get equitable tolling.

The flaw in this logic is in step (2). Certainly, Miranda had a right to appointed appellate counsel *during the course of* his direct review – and thus, as he contends, to the "effective assistance" of that counsel. But as the attorney's letter makes clear, her representation of Miranda *in connection with* Miranda's direct review had ended when she wrote the letter. True, the attorney generously offered some final thoughts – which apparently included a miscalculated due date, or at least a typo – in a letter after the close of her representation. Those thoughts, however, pertained not to the direct review for which she was appointed, but to habeas relief, for which she was not. And Miranda had no right to that advice. *See Pennsylvania v. Finley,* 481 U.S. 551, 555-57 (1987) (explaining that there is no constitutional right to counsel in state post-conviction proceedings); *Ross v. Moffitt,* 417 U.S. 600, 610-11 (1974) (explaining that there is no constitutional right to counsel for discretionary appeals on direct review); *Bonin v. Vasquez,* 999 F.2d 425, 429 (9th Cir.

1993) (Order) ("Clearly, there is no constitutional right to counsel on [federal] habeas.").

Miranda essentially concedes the foregoing in his Reply Brief, but argues that he is entitled to equitable tolling nonetheless. "[I]t may be true that appointed appellant counsel has no duty to advise a client regarding the availability of state or federal habeas relief," Miranda admits. But, he argues, when that counsel undertakes to offer such advice, "it must be accurate." Our precedents foreclose this contention: because Miranda had no right to the assistance of his appointed appellate counsel regarding post-conviction relief, it follows that he did not have the right to that attorney's "effective" assistance, either. *See Miller v. Keeney,* 882 F.2d 1428, 1431-32 (9th Cir. 1989) ("The . . . right to the effective assistance of appellate counsel is derived entirely from the . . . right to appellate counsel, and the former cannot exist where the latter is absent.").

C

Frye, then, cannot be distinguished as Miranda attempts. It controls, and it makes clear that his attorney's "miscalculation of the limitations period . . . and h[er] negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling." *Frye,* 273 F.3d at 1146.

IV

Miranda filed his federal habeas petition fifty-three days late. He has not demonstrated that any "extraordinary circumstances beyond [his] control ma[d]e it impossible to file a petition on time." *Beeler,* 128 F.3d at 1288.

Therefore, the district court properly dismissed Miranda's petition as untimely.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

IBRAHEN BEN MIRANDA, Petitioner,	) No. CV 00-12721-NM (AJW)
v.	) JUDGMENT
ROY A. CASTRO, WARDEN, Respondent.	) (Filed May 17, 2001)

IT IS HEREBY ADJUDGED that judgment is entered dismissing the petition as untimely.

Dated: May 16, 2001

/s/ Nora M. Manella
NORA M. MANELLA
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

IBRAHEN BEN MIRANDA, Petitioner, v. ROY A. CASTRO, WARDEN, Respondent.	No. CV 00-12721-NM (AJW) ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE (Filed May 17, 2001)

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the entire record in this action, the attached Report and Recommendation of Magistrate Judge ("Report"), and the objections thereto. Good cause appearing, the Court concurs with and adopts the findings of fact, conclusions of law, and recommendations contained in the Report after having made a *de novo* determination of the portions to which objections were directed.

IT IS SO ORDERED.

DATED: 5/16/01

/s/ Nora M. Manella
NORA M. MANELLA
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

IBRAHN BEN MIRANDA, Petitioner, v. ROY A. CASTRO, Warden, Respondent.	Case No. CV 00-12721-NM (AJW) REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE (Filed May 1, 2001)

Petitioner, who is represented by counsel, filed this habeas corpus petition pursuant to 28 U.S.C. § 2254 on December 5, 2000. Respondent filed an answer to the petition on February 20, 2001, arguing that the petition should be dismissed as untimely.[1] Petitioner filed a traverse on April 6, 2001.

Background

Petitioner was convicted of two counts of first degree murder and one count of attempted murder. In addition, allegations that petitioner personally used a handgun in the commission of the offenses were found true. [Clerk's Transcript ("CT") 351-355]. Petitioner was sentenced to state prison for a term of 89 years to life. [CT 366-369].

Petitioner appealed to the California Court of Appeal, which affirmed the judgment on April 23, 1999. [Answer,

[1] Respondent also addressed the merits of petitioner's two claims for relief.

Exs. A & B]. He then filed a petition for review in the California Supreme Court, which was denied on July 15, 1999. [Answer, Exs. C & D].

Petitioner did nothing until December 5, 2000, when he filed this federal petition.

Discussion

The AEDPA amended section 2244(d) to impose a one-year statute of limitations for the filing of habeas corpus petitions by state prisoners. 28 U.S.C. § 2244(d).[2] Section 2244(d) provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant

[2] The statute of limitation set forth in section 2244(d) was added by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Because this petition was filed after the enactment of the AEDPA, it is governed by those amendments. *Fuller v. Roe*, 182 F.3d 699, 702 (9th Cir. 1999) (per curiam).

> was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1) & (2).

In petitioner's case, the record does not contain any facts to support the application of the triggering dates set forth in subsections (B) through (D). Pursuant to subsection (A), the one-year limitation period began to run on the date on which judgment became final. 28 U.S.C. § 2244(d)(1)(A).

Petitioner's conviction became final on October 13, 1999 – ninety days after the California Supreme Court denied his petition for review – when the time for seeking certiorari in the United States Supreme Court expired. *Bowen v. Roe*, 188 F.3d 1157, 1158-1159 (9th Cir. 1999). Absent tolling, petitioner had one year from that date – that is, until October 13, 2000 within which to file a

federal petition. *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999); *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1287 (9th Cir. 1997), *cert. denied*, 522 U.S. 1099 & 523 U.S. 1061 (1998), *overruled on other grounds by Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied*, 526 U.S. 1060 (1999). Petitioner, however, did not file his petition until December 5, 2000, nearly two months after the limitation period already had expired. Petitioner recognizes that his federal petition is untimely, but argues that he is entitled to equitable tolling because the attorney representing him in his petition for review sent petitioner a letter indicating that he had until April 23, 2001 within which to file his federal petition. [Memorandum of Points & Authorities in Support of Petition ("Petitioner's Memorandum") at 3-5; Traverse at 3-5]. For the following reasons, petitioner's argument is unpersuasive, and as a result, his petition is barred by the one year period of limitation.

Equitable Tolling

The AEDPA's statute of limitation may be equitably tolled upon a showing of "extraordinary circumstances." *Kelly*, 163 F.3d at 541; *Beeler*, 128 F.3d at 1288-1289. "Equitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." *Beeler*, 128 F.3d at 1288-89. The equitable tolling doctrine has been applied sparingly. *See Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996) (stating the general rule that equitable tolling applies when the defendant's wrongful conduct prevents the plaintiff from asserting a claim or when it is

impossible for the plaintiff to file on time due to extraordinary circumstances beyond his control), *cert. denied*, 522 U.S. 814 (1997). It is properly invoked only "[w]hen external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim. . . . " *Miles*, 187 F.3d at 1007; *see also Scholar v. Pacific Bell*, 963 F.2d 264, 267-268 (9th Cir. 1992). Finally, equitable tolling does not extend to "garden variety claim[s] of excusable neglect." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (refusing to equitably toll the statute of limitations in a case in which untimely filing was due to counsel's absence from the office).

In support of his argument, petitioner submits the following letter sent to him on July 28, 1999 by the attorney representing him in his petition for review filed in the California Supreme Court:

> Dear Mr. Miranda:
>
> I regret to inform you that the California Supreme Court has denied the petition for review of your case. A copy of the Court's order is enclosed for our information.
>
> At this point my appointment to represent you is concluded. If you wish to pursue the case yourself, you may do so through a federal habeas corpus proceeding with respect to the issues raised in the briefs on appeal. If you decide to file such a petition on your own or with other counsel with respect to those issues, you must do so no later than one year after the conclusion of the state court's direct review of your claims. Because it is not clear when that one-year clock starts running, the safest approach would be to file the petition as soon as possible and in any

> event within one year after the issuance of the Court of Appeal opinion, which in this case means by April 23, 2001. (Please note that if for some reason you miss that date, the court may still accept the filing; I am just giving you the most conservative deadline.)
>
> I have enclosed the form for a federal habeas corpus petition and instructions. Alternatively, if you wish to raise additional issues not raised on appeal, you would have to begin the process in the state superior court, again as soon as possible.

[Petition, Ex. D].

Petitioner also submits a declaration in which he states that he read the above letter and informed his family that he had until April 23, 2001 to file a federal petition. [Petition, Ex. E (Declaration of Ibrahn Miranda)]. Petitioner's family "agreed to save money and hire an attorney in plenty of time to do my federal petition." Petitioner states that he relied upon the advice of his appointed attorney and that "but for that reliance my petition would have been filed by October 15, 2000." [Petition, Ex. E].

Petitioner argues that "a pro per defendant with no training in the law should be able to rely on appellate counsel's representation regarding the time constraints imposed by AEDPA and should not be required to second guess statements made by appellate counsel who have a constitutional duty to provide effective assistance." [Traverse at 4].

Petitioner's allegations are insufficient to warrant equitable tolling. First of all, however persuasive petitioner's

general legal argument that pro per prisoners ought to be entitled to rely on appellate counsel's representations regarding the AEDPA may be, it does not help him in the circumstances of this case. Petitioner's attorney properly and repeatedly advised him that he had one year to file his federal petition. His attorney specifically told him that he *must* file his federal petition "*no later than one year after the conclusion of the state court's direct review of your claims.*" [Petition, Ex. D (emphasis supplied)]. Further, counsel advised petitioner that because it was not clear "when that *one-year clock* starts running, the safest approach would be to *file the petition as soon as possible and in any event within one year after the issuance of the Court of Appeal opinion.*" [Petition, Ex. D (emphasis supplied)]. Petitioner's attorney did introduce an ambiguity when she went on to state in the letter that the deadline was April 23, 2001. That erroneous date was the product of either a miscalculation or a simple typographical error. Either way, petitioner was accurately advised of the one year limitation period, and he was aware of both the date of the denial of his appeal by the California Court of Appeal and the date of the denial of his petition for review by the California Supreme Court. The information contained in the letter he received from his attorney placed petitioner on notice of the one year deadline and of the importance of complying with that deadline. Given this situation, a reasonably diligent petitioner should have either assumed that the limitation period was one year or resolved any ambiguity by researching the issue himself or seeking clarification from his attorney. At best, petitioner's failure to do so is excusable neglect; it is not an extraordinary circumstance beyond his control. Likewise, the time spent saving money and hiring a private attorney is not an

external event beyond petitioner's control which prevented him from filing his petition on time.

Petitioner was informed of the one year deadline, he was provided with copies of his state court opinions, and he was provided with a copy of the federal habeas form. Nevertheless, petitioner failed to act diligently in pursuing his claims, claims which already had been fleshed out in his state petition for review. As a result of this lack of diligence, he is not entitled to equitable tolling. *See Miles*, 187 F.3d at 1007.

Finally, support for this conclusion can be found in the Ninth Circuit's recent decision in *Bunney v. Mitchell*, 241 F.3d 1151, 1157 (9th Cir. 2001). In *Bunney*, the court rejected the petitioner's argument that her attorney's failure to file in a timely manner constituted an extraordinary circumstance beyond her control entitling her to equitable tolling. *Bunney*, 241 F.3d at 1157. In doing so, the court noted that the petitioner was aware of the statutory deadline and discussed it with her counsel, but she relied on counsel to comply with the deadline. The court found that her attorney's negligence was "regrettable, but it was not extraordinary." *Bunney*, 241 F.3d at 1157; *see Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (refusing to equitably toll the statute of limitations based on a lawyer's mistake); *Harris v. Hutchinson*, 209 F.3d 325, 330-331 (4th Cir. 2000) (same); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (same); *Sandvik v. United States*, 177 F.3d 1269, 1272 (11th Cir.1999) (same result in 28 U.S.C. § 2255 case).

Like *Bunney*, what happened in this case is unfortunate, but not an "extraordinary circumstance." Consequently, the petition should be dismissed as untimely.

Recommendation

It is recommended that the Court issue an Order: (1) adopting this report and recommendation; (2) directing that judgment be entered dismissing the petition as untimely.

Dated: 4.27.01

/s/ Andrew J. Wistrich
ANDREW J. WISTRICH
United States Magistrate Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IBRAHN BEN MIRANDA, Petitioner-Appellant, v. RAY CASTRO, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellants.	No. 01-56124 D.C. No. CV-00-12721-NM ORDER (Filed Jul. 31, 2002)

Before: O'SCANNLAIN, RYMER, and THOMAS, Circuit Judges.

The Petitioner-Appellant's petition for rehearing is DENIED.

APPENDIX D

Susan E. Nash
P.O. Box 1368
PACIFIC PALISADES, CA 90272-1368
(310) 459-2021
(310) 454-3651 (FAX)

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

July 28, 1999

Mr. Ibrahn B. Miranda
K-84237
High Desert State Prison
P.O. Box 3030
Susanville, CA 96130

Re: People v. Miranda
Court of Appeal No. B119490 (Div. 1)

Dear Mr. Miranda:

I regret to inform you that the California Supreme Court has denied the petition for review of your case. A copy of the Court's order is enclosed for your information.

At this point my appointment to represent you is concluded. If you wish to pursue the case yourself, you may do so through a federal habeas corpus proceeding with respect to the issues raised in the briefs on appeal. If you decide to file such a petition on your own or with other counsel with respect to those issues, you must do so no later than one year after the conclusion of the state court's direct review of your claims. Because it is not clear when that one-year clock starts running, the safest approach would be to file the petition as soon as possible and in any event within one year after the issuance of the Court of Appeal opinion, which in this case means by April 23, 2001. (Please note that if for some reason you miss that

date, the court may still accept the filing; I am just giving you the most conservative deadline.)

I have enclosed the form for a federal habeas corpus petition and instructions. Alternatively, if you wish to raise additional issues not raised on appeal, you would have to begin the process in the state superior court, again as soon as possible.

APPENDIX E

DECLARATION OF IBRAHN B. MIRANDA

I, IBRAHN B. MIRANDA, hereby declare that I am the petitioner in the above action;

that in a letter dated July 28, 1999 my court appointed attorney on appeal, Susan E. Nash, informed me that her appointment had ended and that I had until April 23, 2001 to file my petition in federal court;

that I told my family about this and they agreed to save money and hire an attorney in plenty of time to do my federal petition;

that I did not find out until I retained MARILEE MARSHALL, in November 2000, that my petition had to have been filed by October 15, 2000 in order to have been timely;

that I relied on the advice of my court appointed attorney, Susan E. Nash, and but for that reliance my petition would have been filed by October 15, 2000;

that the above facts are true and correct.

Executed under penalty of perjury this 28 day of November, 2000 at Susanville, California.

/s/ Ibrahn Miranda
Ibrahn B. Miranda

APPENDIX F

DECLARATION OF MARILEE MARSHALL

I, MARILEE MARSHALL, hereby declare that;

I am an attorney duly licensed to practice law in the State of California and have been retained to represent petition in the above entitled cause;

that in November 2000, I was contacted by petitioner's family who wished to retain me on his behalf to file a petition for writ of habeas corpus in the United States District Court;

that I specifically asked about time constraints due to the press of my other legal deadlines and they informed me that the petition was not due until April, and that petitioner's attorney on direct appeal had told him the date it was due in a letter;

that I asked that they bring me all of the pleadings that had been filed in State Court for me to review as part of my consultation and that I would then decide whether to take the case;

that they promptly hand delivered the pleadings to my office and that upon review of the documents and a calculation of the relevant dates, I noted that the statute of limitations had expired, and I also noticed the letter from petitioner's court appointed counsel, on direct appeal advising him that he had at least until April 23, 2001 to file his petition.

that I immediately advised petitioner's family of the situation and they immediately retained me to prepare the instant petition which I prepared on an expedited basis;

that in view of the fact that petitioner relied in good faith on the erroneous advice of his court appointed attorney and that in the absence of that advice would have timely filed his petition, I am requesting that this court find the time for filing his petition was equitably tolled;

that the above facts are true and correct.

Executed under penalty of perjury this 4th day of December 2000 at Pasadena, California.

/s/ Marilee Marshall
MARILEE MARSHALL